Toll Manufacturing Company *and* Leslie R. Pardue. Case 9–CA–37449

May 4, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

The issues in this case are whether the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging employee Leslie R. Pardue and, if so, whether Pardue is entitled to a full backpay remedy notwithstanding the fact that he repeatedly lied under oath during Board proceedings.[1] We agree with the administrative law judge that the Respondent unlawfully discharged Pardue. However, for the reasons set forth below, we find that Pardue's entitlement to backpay should be tolled as of the date that he first lied under oath.[2]

I. BACKGROUND

A. The Judge's Initial Decision

On July 5, 2001, Administrative Law Judge John T. Clark issued his attached initial decision in this proceeding. He found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Pardue on February 23, 2000, because of his union or other concerted activities. The judge found that the inference of discrimination was supported by the facts that Pardue was the leading union activist, that the Respondent was clearly opposed to the Union and knew of Pardue's leadership role, that the discharge came without warning on the heels of the union campaign instigated by Pardue, and that Pardue was assertedly discharged for failing to call in to report absences caused by his medical condition and explained by doctor's notes that had been received before the termination.

The judge also found that the reasons offered by the Respondent for the discharge were pretexts. The Respondent claimed that it discharged Pardue for incidents on February 2 and 3, 2000, in which he failed to properly clock in after lunch and for violating its no-call/no-show rule by not notifying the Respondent within 2 hours of the start of his shifts on the mornings of February 21 and 23, 2000, that he would not be at work. The judge specifically credited the testimony of Pardue and his wife that they had called in to Plant Manager Chad Donley from their home on those two mornings to report that Pardue was sick and would not be reporting to work. The judge also found that the warnings given to Pardue for the alleged lunchtime violations were not validly issued and should not have resulted in any discipline pursuant to the Respondent's attendance policy. In addition, the judge found that the no-call/no-show rule had not been enforced as strictly against other employees. The judge recommended that Pardue be offered reinstatement with backpay.

No exceptions were filed to the judge's decision. Accordingly, in an unpublished Order dated October 26, 2001, the Board adopted the judge's recommended Order. Thereafter, the Respondent reinstated Pardue.

B. The Motion to Reopen

During the compliance investigation, Pardue provided an affidavit dated October 25, 2001, stating that he was unable to work anywhere, due to the mental and physical incapacity allegedly caused by the Respondent's discrimination against him, from the date of his discharge on February 23, 2000, until mid-September 2000. On November 8, 2001, he submitted paystubs indicating that he had worked for another employer during February 2000. The Regional Office then obtained timecards showing that Pardue had clocked in at 7:32 and 7:36 a.m. on February 21 and 23, 2000, respectively, at Zoom Products, an employer located in the Cincinnati, Ohio area.

In a March 6, 2002, deposition taken by the General Counsel in connection with compliance proceedings, Pardue estimated that his residence was "about 60 some miles" from Zoom Products and that it took 45 minutes to 1 hour to drive there. At the deposition, he initially denied working for Zoom Products on February 21 and 23, 2000, stating that he could not be at two places at one time. After being confronted with documents that showed that he had worked for Zoom Products, he still claimed that, to the best of his knowledge and belief, he did not work on those 2 days and that he had called the Respondent from his home on those two mornings. Ultimately Pardue admitted that "I guess I couldn't have made the call." However, he continued, "[I]n my mind, I thought I did make the call, you know. I mean I–I feel that I wasn't even working that day."

Faced with the timecards from Zoom Products and the discrepancies in the deposition, the General Counsel filed a motion with the Board on July 10, 2002, requesting that the record be reopened and the case remanded to the judge. The Board granted the motion and issued, by direction, an unpublished Supplemental Order dated Sep-

[1] As discussed below, reinstatement is not in issue in this proceeding.

[2] The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

tember 3, 2002, vacating its earlier Order, and remanding the case to the judge to reopen the hearing and take additional testimony concerning the call-ins on February 21 and 23, 2000.

C. The Judge's Supplemental Decision

On April 23, 2003, the judge issued the attached supplemental decision in this proceeding.[3] He found that Pardue and his wife lied at the original hearing about calling in on February 21 and 23, 2000, that their testimony at the supplemental hearing was an attempt to perpetuate the falsehood, and that they did not offer any creditable mitigating circumstances to excuse or justify the false statements. Although the judge determined that Pardue did not call in on those two mornings in February 2000, the judge nevertheless concluded that the Respondent had unlawfully discharged Pardue. The judge found that the Pardues' false testimony did not affect, among other things, the facts that the warnings Pardue received for the alleged timeclock violations on February 2 and 3, 2000, were inconsistent with the Respondent's progressive discipline system and that the Respondent had treated him disparately. Thus, the judge concluded that the discrediting of the Pardues did not disturb his finding in his initial decision that the reasons that the Respondent offered for discharging Pardue were pretexts.

The judge again recommended awarding full backpay to Pardue. Although he found that the Pardues' false testimony was a "flagrant affront" to the Board's processes and should not be condoned or rewarded, he found that it was not material to the outcome of the case and probably did not fall within most statutory definitions of perjury. The judge concluded that it would not effectuate the purposes of the Act to require forfeiture of the traditional backpay remedy.

II. ANALYSIS

We have carefully considered the judge's initial and supplemental decisions and the record in light of the exceptions and briefs and have decided for the reasons stated below to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.

A. The 8(a)(3) Violation

We agree with the judge that the Respondent violated Section 8(a)(3) and (1) of the Act when it discharged Pardue. The General Counsel satisfied his initial burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), of showing that Pardue's union activity was a motivating factor in the Respondent's decision to discharge him. As the judge pointed out in his initial decision, Pardue was the leading union activist among the Respondent's employees, the Respondent was opposed to the Union and knew of Pardue's leadership role, and the discharge came precipitously and without prior warning on the heels of the union campaign that had been instigated by Pardue. "The abruptness of the discharge[] and [its] timing are 'persuasive evidence' that the company had moved swiftly to eradicate the . . . prime mover[] of the union drive." *Abbey's Transportation Services v. NLRB*, 837 F.2d 575, 580 (2d Cir. 1988) (quoting *NLRB v. Montgomery Ward & Co.*, 242 F.2d 497, 502 (2d Cir. 1957), cert. denied 355 U.S. 829 (1957).[4]

The dissent posits that the judge "assum[ed]" in his supplemental decision that the General Counsel satisfied his *Wright Line* burden simply because the Board initially adopted the judge's original decision. The dissent is incorrect. In the third paragraph of his supplemental decision, the judge correctly noted that the Board vacated its October 26, 2001 Order adopting the judge's original decision. What the judge did in his supplemental decision was to reaffirm his initial decision, thereby incorporating his analysis of the evidence of unlawful motivation that we have summarized above. In addition, as discussed infra, the judge correctly relied on the Respondent's failure to follow its own progressive discipline system and the Respondent's failure to notify Pardue of the timeclock warnings as further evidence of unlawful motivation. Under these circumstances, the dissent elevates form over substance in arguing that the judge was "obligated to begin his *Wright Line* analysis anew."

In addition, Pardue was treated disparately from other employees who were similarly situated. As discussed more fully below, Pardue was assertedly discharged for failing to call in on 2 days. However, another employee (Jet Reese) engaged in similar conduct and was given only a warning. Similarly, the Respondent's written

[3] The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

[4] In finding that the General Counsel met his burden of showing unlawful animus, Chairman Battista does not rely on the judge's finding that the Respondent's holding of a pizza lunch to celebrate the withdrawal of the union petition, and its teasing of Pardue for wearing a union message on his hat, support an inference of union animus. With respect to the pizza lunch, a party is permitted to sponsor, during an organizational campaign, inexpensive meals. A fortiori, it can do so after the campaign is over. As to the other matter, even if the "teasing" were a means of expressing disapproval of the Union, such an expression is protected by Sec. 8(c).

Member Walsh adheres to the Board's long-held position that conduct not rising to the level of an unfair labor practice may still be used to show antiunion animus. *See Ross Stores*, 329 NLRB 573, 576 (1999), enfd. in pertinent part 235 F.3d 669 (D.C. Cir. 2001); *Affiliated Foods*, 328 NLRB 1107 (1999).

warnings and suspension of Pardue, assertedly for not timely clocking in, were inconsistent with the Respondent's own procedures.

With respect to the disparate treatment, we note that employee Reese had two no-call/no-shows in August 2000. The writeup of these violations states: "Further absenteeism will result in suspension or termination." Thus, Reese received only a warning for his second no-call/no-show. At the hearing, Donley confirmed that Reese had not been discharged for these violations, but Donley did not credibly offer any circumstances to explain the disparity in applying the Respondent's no-call/no-show rule.

The record also establishes that the only other applications of the no-call/no-show policy were in situations when employees simply did not show up for work and were not heard from again.[5] By contrast, Pardue maintained communication with the Respondent. On the afternoon of his second no call/no show, the Respondent received a fax with a notification from Pardue's doctor stating that Pardue was not yet ready to return to work. Further, the other employees were not terminated immediately after the no-call/no-show violations, as was Pardue, and these employees were not terminated while under a doctor's care, as was Pardue.

Our dissenting colleague says that "Pardue was absent from work repeatedly." However, the Respondent assertedly discharged Pardue for violating its "no-call/no-show" policy. That policy provides for termination if there are two violations within a 12-month period. As shown, that policy was disparately enforced.

With respect to the alleged failure to timely clock in after lunch, the Respondent failed to follow its own progressive disciplinary procedures. To begin with, the record fails to establish that employees were required to punch in and out for their lunchbreaks. Further, even assuming that Pardue was required to punch back in when returning from lunch, the written warnings and suspension that he received were inconsistent with the Respondent's attendance rules. Under those rules, Pardue should not have been assessed written warnings and a suspension for a first and second attendance occurrence. The rules provided for a written warning after the fourth occurrence and a suspension after the eighth occurrence. In addition, the Respondent did not impose the written warnings and suspension until the date of discharge, February 23. The failure to clock in occurred on February 2 and 3. Donley's explanation for this discrepancy was specifically discredited by the judge.

The dissent argues that the judge's credibility determinations concerning Donley's testimony must be reevaluated. We disagree. Under any version of the facts, there is no question that Donley did not impose the warnings and suspension until they were used to support Pardue's discharge. The termination letter Donley sent to Pardue stated: "Since Mr. Pardue had not returned to work since that time, his warnings were never passed on to him." However, under any version of the facts, Pardue was at the Respondent's facility on February 11 to pick up a check and could have been provided with the warnings then if the Respondent were truly interested in determining whether misconduct had actually occurred.

Our colleague asserts that the warnings are not at issue because they were not alleged to be independent violations of the Act. We disagree. The fact that the warnings were not independently alleged to have violated the Act does not preclude the conclusion that the trumped-up nature of the warnings supports the judge's finding that the reasons the Respondent gave for discharging Pardue were not in fact relied on, but were pretexts for taking action against a leading union adherent. "There is clearly no obligation on the Board to accept at face value the reason advanced by the employer." *NLRB v. Buitoni Foods Corp.*, 298 F.2d 169, 174 (3d Cir. 1962).

Based on the General Counsel's initial showing of discrimination and on the pretextual nature of the Respondent's defenses, we conclude that the Respondent discharged Pardue for his union activities.

B. Tolling of Backpay

The judge's recommended Order provides for full backpay for Pardue. As we have indicated, we disagree with this recommendation and find instead that Pardue's entitlement to backpay should terminate as of December 12, 2000—the first day of the unfair labor practice hearing and the date that he first lied under oath. As we explain below, this remedy is within our authority, is consistent with Board precedent, and best effectuates the policies of the Act.

The Board is authorized under Section 10(c) of the Act to remedy unfair labor practices with "such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies" of the Act. A court may set aside the Board's remedial order only when "it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943).

[5] The record indicates that the policy was applied in this manner to the following employees: Erick White, Chris Nesby, Patricia Mollet, Chris Bowman, Sonya Nelloms, Ankido Twitty, Charles Lindamood, David Melendez, and Lonnie Miracle.

The Supreme Court reaffirmed this principle in *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 324 (1994). In that case, the Court upheld the Board's discretion to decline to adopt a rigid rule precluding reinstatement of and backpay for a discriminatee who committed perjury while testifying before an administrative law judge. Although the Court stated that false testimony in a formal proceeding is intolerable, it found that there were countervailing considerations. The Court stated: "Most important is Congress' decision to delegate to the Board the primary responsibility for making remedial decisions that best effectuate the policies of the Act when it has substantiated an unfair labor practice." Id. at 323–324. The Court concluded:

> Notwithstanding our concern about the seriousness of [the discriminatee's] ill-advised decision to repeat under oath his false excuse for tardiness, we cannot say that the Board's remedial order in this case was an abuse of its broad discretion or that it was obligated to adopt a rigid rule that would foreclose relief in all comparable cases.

Id. at 325.

In exercising its broad remedial discretion in cases where a discriminatee has made false statements or has otherwise engaged in misconduct during Board proceedings, the Board conducts a "balancing" analysis and assesses the impact of the discriminatee's transgression on the integrity of the Board's processes. Thus, the Board has found that a discriminatee's lie about an issue peripheral to the hearing (i.e., his age), although deliberate and willful, was not "a malicious abuse of the Board's processes under circumstances which require forfeiture of remedy to effectuate the purposes of the Act." *Service Garage, Inc.*, 256 NLRB 931 (1981), enf. denied on other grounds 668 F.2d 247 (6th Cir. 1982) (lie did not go to the heart or even to the periphery of the Board's processes).

The Board also looks to the overall veracity of the discriminatee as well as the scope of the false testimony. Thus, where the major portion of a discriminatee's testimony at an unfair labor practice hearing was credited and relied upon, the discriminatee was given a full remedy even though she gave some false testimony at the hearing. *Owens Illinois, Inc.*, 290 NLRB 1193 (1988), enfd. mem. 872 F.2d 413 (3d Cir. 1989). Similarly, the Board found that the public interest in vindicating the Act outweighed the evil to be contemplated from a discriminatee's "insignificant trespass on the truth" in a case in which an administrative law judge found that a discriminatee's false testimony constituted a very small part of his otherwise credible testimony and played no part in the outcome of the case. *Lincoln Hills Nursing Home, Inc.*, 288 NLRB 510, 512 (1988).

On the other hand, when a discriminatee's conduct is more serious and has a greater impact on the Board's processes, the Board crafts a remedy that accords with the magnitude of the transgression. Thus, a discriminatee who interfered with the Board's processes by attempting to influence and manipulate a witness forfeited the right to backpay beyond the date of the impermissible interference. The Board stated:

> [T]his remedy strikes a balance between the competing and equally important interests of protecting the Board's judicial processes and remedying unfair labor practices. Denying backpay after the date of the threat protects the integrity of the Board's processes by providing that those who abuse the process cannot turn around and use the process to reap a full remedy. Granting backpay until that date also ensures that a respondent's unlawful discrimination does not go unremedied.

Lear-Siegler Management Service Corp., 306 NLRB 393, 394 (1992) (footnote omitted).[6]

The Board has also applied these balancing principles in the context of discriminatees who conceal earnings during backpay proceedings. Thus, "[d]iscriminatees found to have willfully concealed from the Board their interim employment will be denied backpay for all quarters in which they engaged in the employment so concealed." *American Navigation Co.*, 268 NLRB 426, 427 (1983). The Board stated:

> We find that a remedy which denies backpay for the quarters in which concealed employment occurred will discourage claimants from abusing the Board's processes for their personal gain and will also deter respondents from committing future unfair labor practices.

Id. at 428.

More recently, the Board applied *Lear-Siegler* and *American Navigation* in a compliance case to deny backpay at a higher busboy rate to a discriminatee (Baute) who had offered a reward to coworkers for testimony that Baute had worked as a busboy. *Victor's Cafe 52, Inc.*, 338 NLRB No. 90 (2002). The Board found that Baute's conduct effectively made it "impossible to consider the question of Baute's employment as a busboy separately from his offer of payment for testimony to that effect." Id., slip op. at 4 fn. 9. In denying Baute backpay at the busboy rate, the Board concluded:

[6] See also *O'Donnell's Sea Grill*, 55 NLRB 828 (1944).

> We find that our remedy here is consistent with the balance struck by the Board in *Lear-Siegler* and *American Navigation* between the equally important policies of discouraging unfair labor practices by remedying them and protecting Board processes from manipulation by denying Baute any benefit that might have flowed from his interference with Board processes.

Id., slip op. at 4.

Applying these principles to the facts of this case, we find that Pardue's conduct—i.e., abusing the Board's processes by repeatedly lying under oath as to a central issue in the hearing—falls within the rationale of the *Lear-Siegler* and *American Navigation* line of cases. Accordingly, we conclude that Pardue's egregious conduct requires tolling of his entitlement to backpay as of the date of his first lie under oath.

Pardue lied under oath on no less than four occasions. First, at the initial unfair labor practice hearing, he falsely testified that he had his wife call the Respondent from their home on both mornings in question, and that she and he both told the Respondent's plant manager that he was sick and would not be in. Second, in his October 25, 2001 affidavit, he stated that he was not able to work anywhere from the date of his discharge until the middle of September 2000, yet the record establishes that he worked for several employers during this period. Third, at the March 2002 deposition, he untruthfully said that he did not work for the Cincinnati employer in February 2000. Finally, at the second unfair labor practice hearing, he attempted to perpetuate the falsehoods, altered his story, and said that he spoke with the Respondent's plant manager for a minute or two before leaving to go to the Cincinnati job.

It is clear that Pardue abused the Board's processes for his own benefit, that his transgressions were repeated, and that his testimony was generally untrustworthy. Although we ultimately have determined that Pardue's lies were not dispositive as to the lawfulness of his discharge, they went to a central issue in the case (including remedy) and unnecessarily prolonged the litigation. Indeed, Pardue's false testimony resulted in the necessity to reopen the record and to hold the second unfair labor practice hearing.

Under these circumstances, we conclude that tolling backpay as of the date of Pardue's first lie under oath strikes an appropriate balance between the two equally important interests of protecting the Board's adjudication processes and remedying unfair labor practices. Under this balance, Pardue will not be able to abuse Board processes to obtain a full remedy, and the Respondent's unlawful discrimination will not go unremedied.

Accordingly, we find that Pardue is entitled to backpay only from the date of his unlawful discharge on February 23, 2000, until the date of the initial unfair labor practice hearing on December 12, 2000.[7]

AMENDED REMEDY

We will order the Respondent to make whole Leslie R. Pardue for any loss of earnings and other benefits suffered as a result of the discrimination against him, from the date of his discharge until December 12, 2000, the date of his first lie under oath, such amounts to be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Toll Manufacturing Company, Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees because of their support for Teamsters Local Union No. 957, affiliated with the International Brotherhood of Teamsters, or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Leslie R. Pardue whole for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him, from the date of his discharge until December 12, 2000, such amounts to be computed in accordance with the amended remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Leslie R. Pardue, including the warnings served on him at the time of his discharge, and within 3 days thereafter

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[7] As stated above, after the issuance of the Board's October 26, 2001 Order, the Respondent reinstated Pardue. In addition, the record indicates that the Respondent took other affirmative actions to remedy the unfair labor practice it committed.

Inasmuch as reinstatement is no longer in issue, we shall delete the reinstatement provision from the judge's recommended Order. We shall otherwise provide the Board's standard remedies. Any issue regarding the Respondent's remedial obligations under our Order may appropriately be addressed in compliance.

We shall also modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001). We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

notify him in writing that this has been done and that the discharge and warnings will not be used against him in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Dayton, Ohio, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 23, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 4, 2004

Robert J. Battista, Chairman

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

1. Introduction

The issue in this case is whether Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Leslie Pardue because of his union activities. In his original decision, the judge found the violation primarily on the ground that Respondent's asserted reason for discharging Pardue, his failure to call in or report to work on 2 days within a 12-month period, was false and therefore pretextual. In reaching this conclusion, the judge credited Pardue's testimony that he had called in on the days in question and he discredited the testimony of Chad Donley, Respondent's plant manager, that Pardue had not called in.

In his supplemental decision, however, the judge found that Pardue had lied and that Donley had told the truth when he testified that Pardue had not called in on the days in question. But instead of finding that Respondent's reason for discharging Pardue was true and therefore not pretextual, the judge simply reaffirmed his finding in his original decision that General Counsel had met his burden of persuasion and then found other reasons to reaffirm his finding of the violation, i.e., that Respondent applied its no-call/no-show policy in a disparate manner and that two warnings which Respondent had issued Pardue prior to his discharge, which were neither alleged nor found to be unlawful, evidenced that Respondent's reasons for discharging Pardue were pretextual. My colleagues adopt the judge's finding of the violation.

In my view, after having found that Pardue did not call in, as he had testified that he did, and that Donley, whose testimony the judge had thoroughly discredited, had indeed told the truth when he testified that Pardue had not called in, the judge should have reevaluated his credibility resolutions and only then undertaken an analysis of whether General Counsel and Respondent met their respective *Wright Line* burdens.[1] The judge failed to do this. He then failed to engage in a proper *Wright Line* analysis of the issue presented and therefore reached the wrong result. My colleagues only compound the judge's error by adopting his decision.

For the reasons set out below, I find, first, that Respondent's reasons for discharging Pardue were not pretextual and that therefore Pardue's discharge was not unlawful. Second, I further find that even assuming arguendo that Respondent's reasons for discharging Pardue were pretextual, his discharge was not unlawful because the evidence does not support a finding that Respondent was motivated by antiunion animus. Accordingly, I

[1] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). For the General Counsel's and Respondent's respective burdens under *Wright Line*, see fn. 6 below.

would reverse the judge's finding of the violation and dismiss the complaint.

2. Facts

The facts are fully set out in the judge's original decision. In brief, Pardue began working for Respondent as a machine operator in training on October 19, 1999. On December 20, 1999, Pardue was promoted to regular machine operator with a 50-cent-an-hour raise. From late December through early January 2000,[2] Pardue had a dispute with Plant Manager Chad Donley (Donley) over the amount of his raise and his failure to obtain a bonus based on attendance incentives. To determine whether he was entitled to a bonus, Pardue requested and received from Donley certain time records. Not satisfied, Pardue filed a charge with the Board on January 25 alleging that Respondent's denial of a bonus was unlawful. The charge was subsequently dismissed and Pardue's appeal of the dismissal denied.

Also in January, Pardue contacted a representative of the Union. Pardue signed an authorization card on January 10 and sought to organize his fellow employees. Supervisor Scott Butera observed Pardue passing out authorization cards in Respondent's parking lot. On January 19, the Union filed an election petition with the Board and the petition was served on Respondent.[3] On about January 20 or 21, Butera and Donley noticed Pardue wearing a Tommy Hilfiger hat at work on which he had written "union, vote yes" with a check mark. Donley commented "Look at Lester, he has got him a new Tommy Hilfiger hat."

During the same time period, Respondent posted in the plant a document signed by Gerry Donley (Chad Donley's father and Respondent's president) that notified employees of the Union's election petition. Gerry Donley stated in the document that he was "surprised and deeply disappointed that some employees are seeking union representation." The document set out Respondent's opposition to unionization, emphasized the benefits that had been secured without a union, and reminded employees that it needed to "remain a viable business in a competitive marketplace." There was no allegation that the document contained statements unlawful under the Act.

On the morning of January 26, Pardue asked for a meeting with Chad Donley and Butera concerning what Pardue claimed was a threat against him by another employee. Pardue told Donley and Butera that he was being threatened because of his union activities. Pardue was not mollified when Donley told him that both employees had the right to express their views about unionization. Although the judge did not make specific findings regarding the nature of the threat or the details of the meeting, he did find that "it [was] quite clear . . . that, after the threat and the meeting, Pardue was shaken and became incapacitated by stress and anxiety, for which he required medical attention."[4]

After the meeting, Pardue called his longtime companion, Dianne Langford. She picked him up at work and took him to a hospital emergency room, where he received treatment. Langford called Donley later that day and informed him of Pardue's medical condition. Pardue delivered a doctor's note to Donley at the plant on Friday, January 28. The note indicated that Pardue should be off work for 3 days. At Pardue's request, Donley signed the note and gave Pardue a copy. Donley also gave Pardue a blank copy of a medical leave form and told Pardue that if his condition were serious, he might "need more time." Also on January 28, Donley sent a letter to Pardue. The letter referred, inter alia, to Pardue's request for time card reports concerning his pending bonus claim and to their earlier meeting that day. Donley enclosed with the letter a copy of Respondent's attendance policy. Pardue did not report to work on either Monday, January 31, or Tuesday, February first.

On February 1, Donley sent Pardue another letter that included requested time card information. Donley reminded Pardue in the letter that Donley needed to hear from Pardue regarding whether Pardue wanted to take extended medical leave. Donley closed the letter by telling Pardue that if he did not hear from Pardue "this week," he would have to conclude that Pardue "voluntarily resigned" from Respondent.

Pardue returned to work on Wednesday, February 2. At that time, he submitted a February 1 doctor's note that cleared him to return to work. The note also stated that Pardue "may need occasional brief breaks to relieve anxiety." Pardue worked February 2 and 3. On February 2, Respondent provided pizza to the employees and extended the lunch period by having the employees attend, on company time, a 15-minute speech by Donley announcing the Union's withdrawal of its election petition. On February 3, Pardue again complained to Donley about being mistreated by other employees for his union views.

On Friday, February 4, Pardue, or someone acting on his behalf, called Respondent to report that he would be absent that day. On Monday, February 7, Pardue came to the plant and delivered the completed medical leave

[2] All dates are in 2000 unless otherwise stated.

[3] The Union withdrew its election petition on February 1.

[4] As explained below in the "Analysis" section, another employee had threatened to file a lawsuit against Pardue if Pardue's actions harmed the employee's family.

form to Donley. On that form (GC Exh. 8), Pardue's doctor requested leave for Pardue through February 20 for "acute anxiety." Donley accepted the document and granted the request. Pardue never returned to work.

Although there was a dispute over whether Pardue notified the Respondent on the mornings of Monday, February 21, and Wednesday, February 23, that he would be absent on those days, on the afternoon of February 21, the Respondent did receive a faxed doctor's note that Pardue would be off work until February 23 (GC Exh. 9). Donley apparently relied on this note to excuse Pardue's February 22 absence. The Respondent received another note from Pardue's doctor on the afternoon of February 23 explaining that Pardue would not be able to return to work for an "undetermined" time (GC Exh. 10).

On the afternoon of February 23, and after he had received the February 23 doctor's note, Donley sent a letter to Pardue terminating his employment (GC Exh. 11). The letter stated that Pardue had violated Respondent's no-call/no-show policy by failing either to call in within 2 hours of his starting time or report to work on February 21 and 23. The letter also gave as reasons for termination Pardue's clocking in 19 minutes late after lunch on February 2 and his failure to clock in after lunch on February 3. Warnings for those incidents were enclosed in the letter. The warnings were described as first and second warnings for "attendance occurrences." The first said that Pardue must return to work within the break period or he would be subjected to suspension "and up to termination." The second noted Pardue's failure to clock in after lunch and set out a suspension for the failure.

3. The Judge's Decisions and Board Proceedings

a. The Original Decision

In his original decision, the judge found that Respondent violated Section 8(a)(3) and (1) by discharging Pardue because of his union activities. In finding the violation, the judge first relied on his finding that Respondent's asserted primary reason for its discharge of Pardue, i.e., that he twice violated its no-call/no-show policy, was not the real reason for his discharge. Crediting the testimony of Pardue and Langford over that of Donley, the judge found that they had called the Respondent before 8 a.m. on the mornings of February 21 and 23 and notified Respondent that Pardue would not be at work on those days. On this basis, the judge found that Respondent's primary reason for discharging Pardue was false.

Quoting *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (emphasis added), the judge explained that "it has long been recognized that where an employer's stated reasons are false, it can be inferred 'that the [real] motive is one that the employer desires to conceal—an unlawful motive—*at least where . . . the surrounding facts tend to reinforce that inference.*'" Relying on the following factors, the judge found that the record "fairly support[ed]" the inference that Pardue's discharge was for his union activities: (1) Pardue was the leading union activist and Respondent knew of his role; (2) Respondent was opposed to the Union; (3) Donley teased Pardue for wearing a union message on his hat; (4) according to Pardue, Donley failed to assuage Pardue's concerns over a fellow employee's threat concerning his union activities, and this led to Pardue's extended medical leave; (5) on one of the only 2 days that he worked thereafter, Respondent held a pizza party to celebrate the Union's withdrawal of its election petition, and on the other Pardue reported further harassment by fellow employees to Donley; (6) the discharge was precipitous and without prior warning, and "on the heels of the union campaign instigated by Pardue," and (7) Respondent discharged Pardue despite being aware of his medical condition and after receiving the February 21 and 23 doctor's notes.

The judge further found that the inference of discrimination was strengthened by his finding that Respondent's proffered reasons for discharging Pardue were pretextual. The judge discredited Donley's testimony that Pardue had not called in on the mornings of February 21 and 23 and therefore found that Respondent's primary reason for discharging Pardue was false, a pretext to hide the real reason for the discharge, his union activity. The judge supported this finding by further finding that Respondent had treated Pardue more severely than other employees who had violated its no-call/no-show policy.

The judge also found pretextual Respondent's other reason for discharging Pardue as set out in its February 23 termination letter, his violation of its attendance policy on February 2 and 3. In reaching this conclusion, the judge again discredited Donley's testimony concerning his preparation of these warnings, found that the "surreptitious way" Donley prepared the warnings indicated that he was looking for a way to be rid of the leading union adherent, and that Pardue's "only 'mistake' on these occasions was to punch out for lunch when he was not required to do so."

b. The Board's Supplemental Order

The Respondent filed no exceptions to the judge's decision, which essentially turned on credibility. On October 26, 2001, the Board adopted the judge's recommended Decision and Order. Thereafter, Respondent immediately reinstated Pardue. The amount of backpay owing was set for a compliance hearing. During the compliance proceeding, a question arose as to whether Pardue had, in fact, called the Respondent on the morn-

ings of February 21 and 23, as he had testified he had done during the original hearing.

On September 3, 2002, the Board, by direction, issued a supplemental order vacating the judge's decision and remanding the case to the judge to reopen the hearing and take additional testimony concerning the February 21 and 23 call-ins. The Board further directed the judge to issue a decision with findings, conclusions, and recommendations.

c. The Supplemental Decision

On April 23, 2003, the judge issued his supplemental decision in this case. In that decision, the judge discredited the testimony of Pardue and Langford that they had called Respondent on the mornings of February 21 and 23, found that their testimony at the original hearing concerning the telephone calls was false, and that their testimony at the supplemental hearing was "an attempt to perpetuate the falsehood." The judge further found that there were no "mitigating circumstances which would tend to excuse or justify the false statements, given under oath, at both hearings."[5] Nevertheless, the judge still found the violation.

Applying a *Wright Line* analysis,[6] the judge found "the fact that the General Counsel has met [his initial] burden by a preponderance of the evidence was established in the initial decision and adopted by the Board." He then went on to analyze whether the Respondent had rebutted the General Counsel's prima facie case. The judge found that Respondent's reliance on the February 2 and 3 attendance warnings was a pretext to get rid of the leading union adherent and that Respondent's disparate enforcement of its no-call/no-show policy against Pardue further evidenced that its reasons for terminating Pardue were pretextual. Quoting *Key Food*, 336 NLRB 111, 112 (2001), for the proposition that "[a]n employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct," the judge found that Respondent had not met its burden of persuasion and, as noted above, again found the violation.

d. The Majority Decision

My colleagues adopt the judge's finding of the violation. In doing so, they rely on the judge's findings in his supplemental decision that the February 2 and 3 attendance warnings were pretextual and that Respondent enforced its no-call/no-show rule more strictly against Pardue than it did against other employees. On these bases, my colleagues conclude that the real reason for Pardue's discharge was his union activity, and that the reasons proffered by Respondent were only pretextual. I disagree.

4. Analysis

As an initial matter, I find that the judge erred by assuming in his supplemental decision that the General Counsel satisfied his initial burden of persuasion under *Wright Line* because "[t]he fact that the General Counsel has met the burden by a preponderance of the evidence was established in the initial decision and adopted by the Board." As explained above, by its Supplemental Order of September 3, 2002, the Board vacated the judge's original decision in this case and directed that the judge reopen the hearing to address the issue of the February 21 and 23 call-ins, and to issue a new decision with findings, conclusions, and recommendations.

Since the judge found in his original decision that Pardue had called in on February 21 and 23, and that therefore Respondent's termination of Pardue for violating its no-call/no-show policy was false and a pretext by which to get rid of the leading union supporter, the judge was obligated to begin his *Wright Line* analysis anew when he found in his supplemental decision that Pardue had not, in fact, called in on the days in question and that therefore Respondent's reasons for discharging Pardue

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[5] Based on these findings by the judge, and assuming I were to find a violation here, I would join my colleagues in finding that backpay should be cut off on December 12, 2000, the date of Pardue's first lie under oath at the original hearing.

[6] 251 NLRB 1083. As the Board explained in *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996):

> The Board has traditionally described the General Counsel's burden of demonstrating discriminatory motivation as one of establishing a prima facie case. *Wright Line*, 251 NLRB 1083, 1089 (1980)[.] . . . The D.C. Circuit has suggested that in light of *Office of Workers' Compensation Programs v. Greenwich Collieries*, 114 S.Ct. 2551, 2557-2558 (1994) (the General Counsel's burden of proof is a burden of persuasion, not merely of production), "it will no longer be appropriate to term the General Counsel's burden that of mounting a prima facie case; his burden is to persuade the Board that the employer acted out of antiunion animus." *Southwest Merchandising Corp. v. NLRB*, No. 93-1859, slip op. 9 fn. 9 (May 12, 1995). This change in phraseology does not represent a substantive change in the *Wright Line* test. Under that test, the Board has always first required the General Counsel to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity.

As to the employer's burden of persuasion, as explained in *Saginaw Control & Engineering, Inc.*, 339 NLRB No. 76, slip op. at 27 (2003):

> Once the General Counsel has made a prima facie case, the burden shifts back to the employer. That burden requires a respondent "to establish its *Wright Line* defense only by a preponderance of the evidence." The respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

were not false. I will now undertake what the judge failed to do.

In determining whether the General Counsel has satisfied his initial burden of persuasion, one must begin with the fact that the judge erred in crediting Pardue's and Langford's testimony regarding the February 21 and 23 call-ins and by discrediting Donley's testimony regarding same. This error has two effects. First, it removes the primary reason the judge relied on to find Pardue's discharge was pretextual and therefore unlawful. Pardue did not call in, after all, on February 21 and 23 and therefore, as the judge himself admits, the Respondent was justified in discharging him under its attendance policy for two violations of its no-call/no-show policy within a 12-month period.

The second effect of the judge's erroneous credibility finding as to Pardue and Donley is that it raises a question as to whether the judge's other credibility resolutions regarding the testimony of these two witnesses are correct. This is especially significant as to Donley. For, as explained below, the judge bolstered his finding that the February 2 and 3 warnings for clocking in late and failing to clock in at all after lunch were pretextual by discrediting Donley's testimony regarding the events surrounding their preparation. The judge then further bolstered his finding that the February 2 and 3 warnings were pretextual by attacking Donley's credibility in general as "suspect because of his demeanor. . . . a noticeable defensiveness and lack of candor." Yet, on the only credibility issue so far resolved by fact, the February 21 and 23 call-ins, it was Donley who testified truthfully. In these circumstances, I find that the judge's general discrediting of Donley's testimony cannot stand, and that the judge's credibility findings as to Donley, especially in footnote 6 of his original decision, are entitled to less weight, if any at all, than they were prior to the determination that Donley testified truthfully. With these two points in mind, I will now examine the judge's—and my colleagues'—remaining reasons for finding Pardue's discharge both pretextual and unlawful.

Although the judge and my colleagues must now find that Respondent's primary reason for discharging Pardue, his violation of its no-call/no-show policy, was true, they nevertheless still maintain that it was pretextual. They find pretext by insisting that Respondent applied its no-call/no-show policy more strictly to Pardue than it did to other employees whom it discharged for violation of this policy. However, as counsel for the General Counsel pointed out in her post-supplemental-hearing brief to the judge (GC Br.), given the finding that Pardue's discharge was for a valid reason, "the remaining supporting factors fade in significance. Even the Employer's method for handling prior no-call/no-show violations does not reveal such disparate treatment in the new context of Pardue's failure to call in. In that regard, Pardue had been absent from work for about 20 days (including his medical absence) before he submitted his last minute (faxed) excuses." (GC Br. at 11, fn. 8)

I agree with counsel for the General Counsel that Respondent's application of its no-call/no-show policy was not so disparate as to warrant a finding that it was pretextual where prior to Pardue's discharge for violating its no-call/no-show policy, Pardue was absent from work repeatedly. Since it has not been shown that other employees whom Respondent discharged for violation of its no-call/no-show policy had been absent to such an extent prior to their discharges, it cannot be said that those employees were similarly situated to Pardue, and therefore any finding of disparate treatment based on a comparison of their cases with Pardue's would be necessarily misleading and erroneous. In sum, I find that it has not been shown that Respondent treated Pardue disparately from other employees when it discharged him for violating its no-call/no-show policy. Accordingly, I find Respondent's discharge of Pardue for violating the policy to be lawful. I would there dismiss the complaint on this basis.

In dismissing the complaint, I would not find it necessary to consider whether Respondent's February 2 and 3 warnings to Pardue were pretextual. This is so because, as counsel for General Counsel noted in her brief to the judge, it was not alleged that these two warnings were independently violative of the Act, and therefore they are not in issue here. Further, since, as shown above, Respondent's discharge of Pardue for violation of its no-call/no-show policy was lawful, that finding cannot subsequently be found erroneous on the basis of these two warnings, which Respondent may have referred to in its letter to Pardue informing him of his termination, but upon which it did not rely in finding that discharge was warranted. Respondent's "Separation Notice" that sets out the reason for the discharge states as the only reason for termination Pardue's failure to report or call within 2 hours of shift start on February 21 and 23 (GC Exh. 12).

In sum, after concluding that Respondent's reason for discharging Pardue, his violation of its no-call/no-show policy, was lawful, any analysis of the warnings is misplaced because it cannot change the result. Respondent lawfully relied on the no-call/no-show violations, not the warnings, to terminate Pardue.

Having said this, I would only make two observations regarding the judge's and my colleagues' reliance on the warnings to help justify their finding that the reasons for Pardue's discharge were pretextual and therefore unlawful. First, for the reasons explained above regarding the

judge's credibility findings, I would not discredit, without more, Donley's testimony regarding his preparation of the February 2 and 3 warnings. Donley, after all, proved to be a credible witness regarding the central issue in the case and, given this, the judge should have reconsidered in his supplemental decision his original finding that Donley's testimony was not to be credited. Thus, it is difficult to accept without further explication—wholly lacking here—the judge's original finding that Donley's testimony regarding his preparation of the warnings, as set out at footnote 6 of the judge's original decision, is not credible and that "[t]he surreptitious way Donley handled these warnings shows that he was looking for a way to be rid of the leading union adherent."

Second, the judge's finding that Donley prepared the warnings in a "surreptitious way" seems to derive from the judge's further findings that "employees were not even expected to punch in and out for lunch" and that "Pardue's only 'mistake' on these occasions was to punch out for lunch when he was not required to do so." By such statements, the judge seems to imply that Respondent singled Pardue out to sign out and in for lunch and thereby, in effect, set him up for violations of the attendance policy and the February 2 and 3 warnings.

Pardue, however, testified without contradiction at the original hearing in this case, in response to a question from counsel for General Counsel as to why he clocked out if he did not have to, that he clocked out "[d]ue to the fact that my union rep had advised me to clock in and out, for my union activities going on, in case something happened, to protect my job." (Tr. 64:21–23) Given that Pardue opted to clock out, Respondent can hardly be said to have singled Pardue out for violation of its attendance policy on February 2 and 3. Having clocked out, Pardue was then further obligated to clock back in after lunch so that Respondent could maintain a record of Pardue's hours and fairly determine his wages. In these circumstances, if I were to consider the February 2 and 3 warnings relevant to the issue of whether Pardue's discharge were unlawful, I would find that the warnings were justified. They support, rather than undermine, Respondent's reason for discharging Pardue.

For all these reasons, I find that Respondent's reasons for discharging Pardue were valid, and not pretextual, and that therefore the judge's finding of the 8(a)(3) violation should be reversed and the complaint dismissed. Further, for the reasons explained below, I would find that the complaint should be dismissed even if it were shown that Respondent's reasons for discharging Pardue were, in fact, pretextual.

As explained above, in his original decision, the judge relied on *Shattuck Denn Corp. v. NLRB*, 362 F.2d at 470, for the proposition that "where an employer's stated reasons are false, it can be inferred 'that the [real] motive is one that the employer desires to conceal—an unlawful motive—*at least where . . . the surrounding facts tend to reinforce that inference*"' (emphasis added). In finding that the record in this case "fairly support[ed]" the inference that Pardue's discharge was for his union activities, the judge relied, in effect, on seven factors.[7] For the reasons set out below, I find that these seven factors do not support an inference that Respondent discharged Pardue because of his union activity.

Initially, I agree with the judge that Pardue was the leading union activist and that Respondent knew of his role. And I agree with the judge that Respondent opposed the Union. Gerry Donley's notice to employees of the Union's filing of an election petition evidences Respondent's opposition. However, as explained above, it was not alleged that that document contained any statements unlawful under the Act. Further, while Donley "teased" Pardue about his hat, and Respondent celebrated the Union's withdrawal of its election petition with a pizza party, I agree with Chairman Battista, for the reasons set out at footnote 4 of the majority decision, that such conduct does not evidence antiunion animus. Further, while the judge seems to imply that Respondent purposely held the pizza party on February 2 when Pardue would be at work, the fact is that, as noted above, the Union withdrew its petition on February first. In these circumstances, Respondent's holding of the pizza party the next day cannot be used to suggest, as the judge appears to do, that Respondent purposely held the pizza party on a day that Pardue would be working. For these reasons, I find that this factor does not support an inference that Respondent discharged Pardue because of his union activity.

The next factor fares no better. Here, "according to Pardue," Donley failed to assuage Pardue's concerns over a fellow employee's threat arising from Pardue's union activities. Initially, since the judge appears to have credited Pardue's version of events by his use of the

[7] As set out above, these seven factors are: (1) Pardue was the leading union adherent and Respondent knew of his role; (2) Respondent was opposed to the Union; (3) Donley teased Pardue for wearing a union message on his hat; (4) according to Pardue, Donley failed to assuage Pardue's concerns over a fellow employee's threat concerning his union activities, and this led to Pardue's extended medical leave; (5) on one of the only two days that Pardue worked thereafter, Respondent held a pizza party to celebrate the Union's withdrawal of its election petition, and on the other Pardue reported further harassment by fellow employees to Donley; (6) the discharge was precipitous and without warning, and came "on the heels of the union campaign instigated by Pardue"; and (7) Respondent discharged Pardue despite being aware of his medical condition and after receiving the February 21 and 23 doctor's notes.

phrase "according to Pardue," I am wary of assigning any weight to this factor for the reasons set out above regarding the judge's credibility resolutions. However, an examination of the testimony shows no dispute as to what happened on January 26, the date of Pardue's first meeting with Donley and Butera over alleged harassment of him because of his union activity, or on February 3, the date of the second meeting with Donley over such alleged harassment.

The record shows that Pardue met with Donley, Butera, and employee Alan Hulsey on the morning of January 26 after Pardue had complained to Donley about being threatened by Hulsey because of his union activities. Pardue testified as follows about the meeting (Tr. 60:6–11):

> At that point in time in the meeting, I stated to Mr. Donley and to Scott Butera that Alan Hulsey is threatening me over my union activities.
>
> At that point in time, Mr. Chad Donley stated that Alan Hulsey has a right to express his feelings, that it is called freedom of speech.

Pardue went on to testify that it was shortly after this meeting that he called Langford and that she came to the plant to pick him up and take him to the hospital.

Donley's testimony about this meeting does not contradict Pardue's, but it does provide more information about what happened at the meeting. Donley's testimony stands uncontradicted. In response to a question about what Donley and Pardue said at the meeting, Donley testified as follows (Tr. 247:21–249:6):

> I basically said, "Okay, Les, what is the problem", and I gave him a chance to share, and Les was very charged, saying, "This employee, he threatened me on the floor, and I'm not going to take it. It's just because of my Union affiliation that I'm being harassed". And I talked to him right there and I said, "I don't know what you're talking about. I don't want harassment, but until this point I've never heard anything to the effect of Union affiliation, but what did he say", and he basically said, "He threatened me, he threatened me". And I said, "is that it?", and he sort of accepted that yes, and I said, "Okay, Allen [Hulsey], what is your version of what happened. You tell me what happened."
>
> . . . .
>
> [Hulsey] said, "I didn't threaten you. What I said was that if you caused harm to my family because of what you're doing, I'm going to sue you". And I said, "Well, I don't see that as threatening in a sense. You guys are obviously entitled to your opinion, but I don't want it to be personal. If it gets personal, then it becomes a matter for me or the supervisor, but if it's just opinion, you're entitled to that, but when it gets personal, then I become involved or we become involved." And I basically closed the conversation—or the meeting with 'you both don't have to like each other, but you do have to work together. If this continues or there is a problem beyond this, then we'll deal with it at that time, but right now you guys need to learn—need to understand that you need to work together'.

Donley went on to testify that Pardue left the plant about an hour after the meeting ended, and after informing Donley that "he didn't feel well." (Tr. 249:15–16.)

I have set out Pardue's and Donley's testimony concerning the January 26 meeting at some length because I believe that this testimony itself contradicts the judge's statement that "[o]n the present record, I am unable to make specific findings as to the nature of the threat or the details of the meeting" (Decision at II.A. 2, last paragraph). The judge made this finding after earlier stating that Pardue's and Donley's versions of the events "are generally compatible . . . but their versions differ somewhat on the details" (Id). In fact, Pardue's and Donley's versions of the events are indeed compatible. Further, to the extent that they differ as to details, that difference does not arise from testimony that is contradictory, but only from Donley's fuller account of what happened at the meeting, an account that has not been contradicted.

In declining to rely on Donley's testimony to further explain what happened at the January 26 meeting, the judge apparently discredited Donley's testimony *sub silentio*. In my view, the judge erred by discrediting this testimony, and only compounded that error in his supplemental decision by failing to revisit the issue when, as explained above, it was proven that Donley's testimony at the original hearing, explicitly discredited by the judge, was, in fact, truthful.

Relying on both Pardue's and Donley's testimony, I find that the "threat" at issue in the January 26 meeting concerned Hulsey's statement to Pardue that he would file suit against Pardue if what he was doing caused harm to Hulsey's family. Even assuming that Hulsey was referring to Pardue's union activities when he spoke of "what [Pardue was] doing," I find that Respondent acted lawfully. Granted that Pardue might, indeed did, find Hulsey's statement harassing, such harassment, consisting of a promise to file suit rather than threat of bodily harm or intimidation, is not the type of harassment that the Board finds unlawful. Rather, in the analogous context of employee complaints regarding harassment by union supporters, the Board routinely finds attempts by

employers to enjoin such harassment unlawful. See, e.g., *Niblock Excavating, Inc.*, 337 NLRB 53, 61 (2001), enfd. 59 Fed.Appx. 882 (7th Cir. 2003) (Board found unlawful an employer letter that stated, inter alia, "If you feel threatened or harassed during your working hours we urge you to report this to your foreman, and the problem will be immediately addressed.") Finally, as to the alleged "harassment" of February 3, Pardue testified that he wanted a meeting with Donley and Butera because another employee had called him "names." (Tr. 71:18–23) Enough said. In these circumstances, Respondent's failure to "assuage" Pardue does not support an inference that Pardue was discharged because of his union activity.

I agree with the judge that Pardue's discharge was "precipitous and without prior warning," but I do not agree that it came "on the heels of the union campaign" to the extent that the phrase suggests that one event caused the other. Just because Pardue's union activities and the union campaign preceded the discharge, it does not necessarily follow that Pardue's union activities were the reason for his discharge. That is especially true here where the union campaign ended with the Union's withdrawal of its election petition on February 1, several weeks before the discharge and where, as explained above, there is no evidence of hostility on the Respondent's part toward Pardue for his role in the union campaign, nor evidence of antiunion animus generally. This factor, therefore, does not support an inference that Pardue was discharged because of his union activity.

Finally, as to the judge's statement that Pardue was discharged "despite" Respondent's knowledge of Pardue's medical condition, and after receiving the February 21 and 23 doctor's notes, I can only observe here that Pardue's discharge followed hard upon Respondent's receipt of the February 23 doctor's note which stated, inter alia, that Pardue was unable to return to work on that date, that Pardue would see the doctor again on "2/28/00," and that it would then be determined when Pardue could return to work (GC Exh. 10).

In sum, all these factors, aside from Pardue's role as the leading union adherent and Respondent's knowledge of that role, are either neutral or support an inference that Respondent discharged Pardue not because of his union activity in January, but because of his frequent absences in February, absences which the doctor's February 23 note showed would only continue into the future. If anything, I believe that these factors support an inference that it was this note, and not union activity, that caused Respondent to discharge Pardue for an infraction of its no-call/no-show policy that occurred on the same day that it received the note.

As the Board explained in *Precision Industries*, 320 NLRB 661, 661 (1996), enfd. sub nom. *Pace Industries v. NLRB*, 118 F.3d 585 (8th Cir. 1997), cert. denied 523 U.S. 1020 (1998) (footnote omitted):

> Having discredited the Respondent's explanations for its actions, the judge was entitled to infer that there was another reason, but it does not necessarily follow that the real reason was grounded in antiunion animus. Those explanations might have been offered in an attempt to conceal a violation of some other statute instead of the Act, or a motive that may have been base but not unlawful at all.

Assuming, arguendo, that Respondent's reasons for discharging Pardue are pretextual, it does not necessarily follow "that the real reason was grounded in antiunion animus." The judge, and my colleagues, rely on certain inferences to argue that Pardue's discharge was caused by his union activity and was therefore unlawful. But, as shown above, the inferences suggested by the judge actually support a finding that the real cause lies elsewhere, and that, especially in the absence of any antiunion animus on Respondent's part, one cannot simply assume that Respondent's discharge of Pardue was unlawful because it followed his union activities and the union campaign. The issue here is what *motivated* Pardue's discharge. I do not find that the General Counsel has shown by a preponderance of the evidence that the discharge was motivated by antiunion animus.

5. Conclusion

For the reasons explained above, and assuming that the General Counsel satisfied his initial burden of persuading that Pardue was discharged because of his union activity, it is clear that Respondent successfully rebutted the presumption that the discharge was unlawfully motivated by showing that it discharged Pardue for a lawful reason, his violation of its no-call/no-show policy. Further, and assuming, again only arguendo, that it can be shown that Respondent's reasons for discharging Pardue were pretextual, it is also clear that the General Counsel has not satisfied his ultimate burden of showing that Pardue was discharged for his union activities because, as explained above, the factors the judge, and now my colleagues, relied on to support an inference that Pardue was discharged because of his union activities do not, in fact, support that inference and, indeed, undercut it. For all these reasons, I would reverse the judge's finding of a violation and dismiss the complaint.

Dated, Washington, D.C. May 4, 2004

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of The
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters Local Union No. 957, affiliated with the International Brotherhood of Teamsters, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you as set forth above.

WE WILL make whole Leslie R. Pardue for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him, from the date of his discharge until December 12, 2000.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the unlawful discharge of Leslie R. Pardue, including the warnings served on him at the time of his discharge, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge and warnings will not be used against him in any way.

TOLL MANUFACTURING COMPANY

Engrid Emerson Vaughan, Esq., for the General Counsel.
Michael Glassman, Esq., for the Respondent.
Dianne Pardue, for the Charging Party.

SUPPLEMENTAL DECISION

JOHN T. CLARK, Administrative Law Judge. I initially heard this case in Dayton, Ohio, on December 12, 2000. On July 5, 2001, my recommended decision issued finding that Toll Manufacturing Company (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging employee Leslie R. Pardue on February 23, 2000, because of his union or other concerted activities. The Board, in the absence of exceptions being filed by any party, adopted the recommended Decision and Order in an unpublished Order dated October 26, 2001.

On July 10, 2002, counsel for the General Counsel, pursuant to Section 102.28(d)(1) of the Board's Rules and Regulations, filed a motion requesting that the record be reopened and the case remanded to me for further hearing. The basis for the motion was newly discovered evidence that cast doubt on the testimony of Charging Party Leslie R. Pardue, and inferentially, on the testimony of his corroborating witness Dianne Langford Pardue, regarding a material fact. The material fact concerned the Pardues' credited testimony, over the Respondent's denial, that Leslie Pardue telephoned the Respondent from their home in Dayton, Ohio, between 7 and 9 a.m. on February 21 and 23, 2000, to report off from work. The Board granted the motion and issued, by direction, an unpublished Supplemental Order dated September 3, 2002.

The Board's Supplemental Order vacates its October 26, 2001 Order, remands the case to me for the purpose of reopening the hearing, taking additional testimony concerning the call-ins on February 21 and 23, 2000, and issuing a decision with findings, conclusions, and recommendations. Pursuant to the Board's Order and my Order, the Regional Director for Region 9 on October 1, 2002, issued an intent to issue notice of supplemental hearing, and on October 17, 2002, issued the Order scheduling the hearing. Accordingly, the supplemental hearing in this matter was held on November 19, 2002, in Dayton, Ohio.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the General Counsel[1] and the Respondent, I make the following[2]

FINDINGS OF FACT

I. BACKGROUND

The findings of fact are more fully set forth in the attached initial decision, to which no exceptions were filed. The complaint alleges that the Respondent discharged Leslie Pardue on February 23, 2000, because of his union or other concerted activities. The Respondent argues that Pardue was discharged for two incidents where he failed to properly clock in after lunch and for failing, on February 21 and 23, 2000, to notify the Respondent that he would not be at work within 2 hours of the start of his shift.

[1] Counsel for the General Counsel's unopposed motion to correct the transcript, dated Dec. 23, 2002, is granted except that "Diane" is changed to "Dianne," based on Ms. Pardue's spelling in her brief.

[2] Ms. Pardue filed a document entitled "brief," on behalf of the Charging Party. The document was untimely filed and I served it on the parties. The document argues facts not in evidence, and generally is of no probative value. It was obvious at the hearing that Ms. Pardue is not legally trained and is unfamiliar with labor law. The document is included solely to complete the record.

I found that neither timeclock incident should have resulted in discipline, that the Respondent never investigated either incident, did not inform Pardue about the discipline until it was used as a basis for his discharge, and that the discipline was excessive, even when compared with the Respondent's written policy of progressive discipline. Regarding the contention that Leslie Pardue failed to show up or report off work within the allotted time I credited his, and Dianne Pardue's testimony, that he had notified the Respondent by telephone sometime after 7 a.m., on both days, that he would not be at work. The Respondent denied receiving either call.

Neither the above findings, nor any portion of the decision, was contested by any party. The Board adopted the recommended Decision and Order on October 26, 2001, and the Respondent complied with the nonmonetary provisions of the Order. As part of a compliance investigation to determine the amount of backpay owed to Pardue, Pardue provided an affidavit, dated October 25, 2001, stating that he was unable to work anywhere, from February 23, 2000, until mid-September 2000. (GC Exh. X, Deponent's Exh. 4 at 1–2.) On November 8, 2001, Pardue submitted another affidavit, and pay stubs, indicating that he had worked for Crown Temporary Services during February 2000. Eventually the Region obtained timecards showing that Pardue clocked in at 7:32 a.m. and 7:36 a.m. on February 21 and 23 respectively, at Zoom Products, an employer located in the Cincinnati, Ohio area. In a March 6, 2002 deposition, Pardue estimated that his residence was "about 60 some miles" from where he worked at Zoom Products. He further estimated that it took him from 45 minutes to an hour to drive that distance. (GC Exh. X at 22–23.) Faced with the newly discovered timecards, and the obvious discrepancies, the General Counsel moved to reopen the record and remand the case.

II. SUPPLEMENTAL HEARING

At the original hearing Pardue testified that he had Dianne Pardue call the Respondent "a little after 7 a.m." on February 21 from their residence in Dayton, Ohio. (Tr. 85, 127.) He estimated that he and Dianne Pardue spoke with Plant Manager Chad Donley for a total of "approximately ten minutes, maybe." (Tr. 128.) Regarding the call-in on February 23, his testimony was more specific. Pardue stated that he knew that Dianne called Donley at 7:20 a.m. because he "looked at the clock," and that the call lasted approximately 10 minutes. (Tr. 78, 128.)

In his March 6, 2002 deposition, Pardue initially denied being at Zoom Products on February 21 and 23, however, after being confronted with his timecards he admitted that he could not have called the Respondent. (GC Exh. X at 22–23, 59.) Pardue also estimated that it took him at least 45 minutes to drive from his residence to Zoom Products. (GC Exh. X at 22.) Pardue does not deny the authenticity or accuracy of the timecards.

At the supplemental hearing Pardue contended that the conversation between himself, Dianne Pardue, and Donley lasted no longer than 2 minutes. He estimated that he only drove 30 miles to work at Zoom and that it took only 27 to 30 minutes. Pardue further stated that the route he drove was entirely on two lane roads, consisted of at least seven turns and "a couple" of stop signs, and was driven at speeds in excess of 60 miles per hour. (Supp. Tr. 69, 86–89.)

Assuming, for the sake of argument, that his statements do not defy the laws of physics, Pardue's current version of the events on February 21 might be mathematically possible. Regarding the morning of February 23, 2000, however, not only must it be believed that his travel time took not 45 minutes to an hour, but 27 to 30 minutes, that the entire conversation lasted not 10 minutes, but only 2 minutes, and last, but not least, that the conversation occurred not at 7:20 a.m., but at 7 a.m. This last fact is the most disconcerting. In his sworn testimony at the initial hearing he not only testified to the specific time that the call was made, 7:20 a.m., but that the reason he knew the exact time was because he had "looked at the clock." The only generalized explanation Pardue offered regarding his contradictory statements is that he was taking medication at the time of the initial hearing, as he was at the time of the supplemental hearing. Pardue offered no corroborating evidence to demonstrate that any medicine he was taking was capable of causing this great a memory lost or state of confusion. Based on my observations of him during both hearings, he did not appear to be under the influence of any substance, prescribed, or otherwise.

At the supplemental hearing Dianne Pardue, once again, attempted to corroborate her husband's testimony. Thus, she testified that the calls were made around 7 a.m., and that Pardue drove himself to Zoom Products in only 27 or 30 minutes. At the initial hearing Dianne Pardue testified that the telephone call on February 21 was made approximately around 7 a.m. and the call on February 23 was "approximately between 7:15 and 7:20." She also recalled the time of the calls because she looked at the clock each time she called. (Tr. 177, 180.) When asked to explain these, and other contradictory statements in her testimony, she stated that emotional stress caused her to be psychologically sick.

Based on the foregoing obvious and unexplained contradictions I do not credit the testimony of Leslie Pardue or Dianne Pardue regarding the alleged telephone calls to the Respondent on February 21 and 23, 2000. I find that their testimony at the original hearing concerning the telephone calls is false, and that their testimony at the supplemental hearing is an attempt to perpetuate the falsehood. Additionally, I find that neither Pardue has offered any creditable, mitigating circumstances which would tend to excuse or justify the false statements, given under oath, at both hearings. Accordingly, I find that Leslie Pardue did not notify the Respondent that he would not be at work on February 21 or 23, 2000, within 2 hours of the start of his shift.

III. ANALYSIS

Although Pardue's lack of truthfulness is a factor which must be weighed, the ultimate question where discrimination is alleged, and that was I addressed in the initial hearing, is the actual motivation of the Respondent. See, *Schaeff Inc.*, 321 NLRB 202, 210 (1996), enfd. 113 F.3d 264 (D.C. Cir. 1997), and cases cited therein. Thus, even if a discriminatee is lacking in credibility, a preponderance of the credible testimony and

other evidence could lead to a conclusion that there has been unlawful motivation—that the respondent took disciplinary action against that employee which would not have been taken had the employee not been active on behalf of, or at least sympathetic toward, a union. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Under the *Wright Line* methodology the General Counsel has the initial burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged decision. The fact that the General Counsel has met the burden by a preponderance of the evidence was established in the initial decision and adopted by the Board. Once the unlawful motivation is established, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have occurred even in absence of the protected activity. The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

The prior decision found that both reprimands for the alleged timeclock violations were prepared based solely on Donley's review of the employee timesheets. There was no attempt to notify Pardue of the reprimands before they were used as a basis for his discharge. Donley never attempted to question Pardue about the incidents or to conduct any independent investigation. Donley's conduct is an objective indication of unlawful motivation. See *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enfd. 95 F.3d 681, 685 (8th Cir. 1996). An additional objective indication of unlawful motivation is that the issuance of the warnings was inconsistent with the Respondent's progressive discipline system. *Tubular Corp. of America*, 337 NLRB 99 (2001). Thus, as found in the initial decision, it was evident from the outset that the Respondent "was looking for a way to be rid of the leading union adherent," and the Respondent was ordered to remove the unlawful disciplinary actions, dated February 2 and February 3, from its files. It follows that the subsequent discharge, which was based in part on those warnings, also violates the Act.

I disagree with counsel for the General Counsel's current position that "the Employer's method for handling prior no-call/no-show violations does not reveal such disparate treatment in the new context of Pardue's failure to call in." (GC Supp. Br. 11, fn. 8.) Pardue's lack of credibility does not negate the Respondent's disparate treatment of him. As counsel for the General Counsel correctly argued in the initial hearing "assuming arguendo that Pardue did not call in on the days in question, the record establishes Donley's disparate treatment of Pardue in discharging him for a violation of a policy which Respondent's records show normally was applied to employees who just simply did not show up for work and were not heard from thereafter." (GC Br. 8.) The Board has repeatedly stated that evidence of "blatant disparity is sufficient to support a prima facie case of discrimination." *Sears, Roebuck & Co.*, 337 NLRB 443, 443 (2002), and cases cited therein.

"The Board has long held that '[a]n employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct.'" *Key Food*, 336 NLRB 111, 112 (2001). (Citations omitted.) The "mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity." (Citation omitted.) *NLRB v. Symons Mfg. Co.*, 328 F.2d 835, 837 (7th Cir. 1964). Accord: *Singer Co. v. NLRB*, 429 F.2d 172, 179 (8th Cir. 1980).

IV. CONCLUSION

Based on the foregoing I reaffirm the initial Decision and Order issued on July 5, 2001, (JD–91–01) (attached), finding that the Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully discharging Leslie Pardue.

REMEDY

The Respondent has complied with all aspects of the remedial order except the backpay award. The Board has broad remedial discretion in fashioning an appropriate remedy. The Supreme Court concluded that, despite an employee's false testimony, the Board's decision not to make a categorical exception to the usual remedy of reinstatement with backpay was within the Board's broad discretion. *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317, 325 (1994). The Board will withhold the usual remedy of reinstatement with backpay from a discriminatee who makes false statements at a hearing when the discriminatee's conduct "amount[s] to a malicious abuse of the Board's processes under circumstances which require forfeiture of remedy to effectuate the purposes of the Act." *Service Garage, Inc.*, 256 NLRB 931 (1981). When possible the Board seeks to find a balance "between the equally important policies of discouraging unfair labor practices by remedying them" and protecting the Board's processes. *Victor's Café 52, Inc.*, 338 NLRB No. 90, slip op. at 4 (2002).

Certainly the false testimony of Leslie and Dianne Pardue, is a "flagrant affront" to the Board's processes, that should not be condoned nor rewarded. *ABF*, above at 323. Their false testimony is not, however, material to the outcome of the case and probably does not fall within most statutory definitions of "perjury." *Service Garage*, above at 935 fn. 4. I have also considered the fact that to deny Pardue backpay would, in essence, be rewarding the Respondent-wrongdoer. See generally *Airport Park Hotel*, 306 NLRB 857, 858 (1992), and cases cited therein (applying the principle, in the context of a backpay proceeding, that uncertainties are resolved against the Respondent-wrongdoer). Under the circumstances of this case I find that it will not effectuate the purposes of the Act to require forfeiture of the traditional remedy of backpay as set forth in the "Remedy" section of the initial decision.

ORDER

Based on the foregoing I reaffirm the initial Decision and Order that issued on July 5, 2001, (JD–91–01), attached, and adopted by the Board on October 26, 2001.

Dated, Washington, D.C. April 23, 2003.

Engrid Emerson Vaughan, Esq., and *Earl Ledford, Esq.*, for the Acting General Counsel.

Michael Glassman, Esq., of Cincinnati, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. I heard this case in Dayton, Ohio, on December 12, 2000. The charge was filed March 1, 2000,[1] and the complaint was issued on May 30, 2000. The complaint alleges that Toll Manufacturing Company (Respondent) violated Section 8(a)(3) and (1) of the National Labor Relations Act (Act) by discharging employee Leslie R. Pardue on February 23, 2000, because of his union or other concerted activities. The Respondent denies violating the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by counsel for the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, repackages pet food at its facility in Dayton, Ohio, where, within the past 12 months, it has performed services valued in excess of $50,000 for nonretail enterprises located within the State of Ohio, each of which, in turn, annually sells and ships goods valued in excess of $50,000 from points within the State of Ohio, directly to points outside the State of Ohio. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Teamsters Local Union No. 957, affiliated with the International Brotherhood of Teamsters (Union), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

Leslie Pardue began his employment with Respondent as a machine operator in training on October 19, 1999. He worked on the first shift, which began at 6 a.m. and ended at 2:30 p.m., with a 45-minute lunch period from 11:15 to 12 noon. On December 20, 1999, Pardue was promoted to regular machine operator and given a 50-cent-an-hour raise. Pardue was not issued any disciplinary warnings during his employment, until the date of his discharge on February 23, 2000. The reasons given by Respondent for his termination were failing to call in on 2 occasions and failing properly to punch in and out for lunch on 2 occasions.

Beginning in late December and through early January, Pardue had a dispute with Plant Manager Chad Donley over the amount of his raise and his failure to obtain a bonus based on attendance incentives. Pardue asked Donley for time records so that he could determine if he was entitled to the bonus. Donley provided some records, but Pardue was not satisfied with what he was provided. On January 25, Pardue filed a charge with the Board's Regional Director alleging that Respondent's denial of a bonus to him was unlawful. The charge was dismissed by the Regional Director on May 25, 2000; Pardue appealed the dismissal but the appeal was denied.

2. Pardue's union activities and Respondent's reaction

At about the same time he was pursuing his claim to a bonus, and in response to other employee complaints about working conditions, Pardue contacted a representative of the Union. He signed a union authorization card on January 10, 2000, and sought to organize the employees. Pardue passed out blank union authorization cards to his fellow employees, collected signed cards, and submitted them to the Union. He was observed by Supervisor Scott Butera while he was passing out cards in Respondent's parking lot. On January 19, the Union filed an election petition with the Board and that petition was served on the Respondent.[2]

Thereafter, on about January 20 or 21, Pardue wore a Tommy Hilfiger hat to work, on which he had written "union, vote yes" with a check mark. Butera and Plant Manager Chad Donley noticed him wearing the hat and Donley commented, "look at Lester, he has got him a new Tommy Hilfiger hat." Sometime later, Butera told Pardue that he and Donley thought that another employee had "organized" the Union until they saw Pardue's hat. According to Pardue, none of the 20 to 25 other hourly employees wore such a hat.[3]

At about this time, Respondent posted a document in the plant notifying the employees of the Union's election petition. The document was signed by Gerry Donley, Chad's father and the president of Respondent. President Donley stated that he was "surprised and deeply disappointed that some employees are seeking union representation." The document, which has not been alleged to contain anything unlawful under the Act, also set forth Respondent's opposition to unionization, emphasizing the benefits that had been secured without a union and reminding employees that it needed to "remain a viable business in a competitive marketplace."

On the morning of January 26, Pardue asked for a meeting with Donley and Butera about what Pardue described as a threat against him by another employee. Pardue told his supervisors that he was being threatened "over my union activities." Donley tried to resolve the matter by stating that both employees had the right to express their views about unionization, but Pardue was not mollified. Only Donley and Pardue testified about this meeting and their versions are generally compatible

[1] All dates are in 2000 unless otherwise indicated.

[2] The petition was withdrawn by the Union on February 1, 2000.

[3] The above is based on Pardue's uncontradicted testimony. Butera did not testify in this proceeding. He was no longer employed by Respondent at the time of the hearing.

to the extent set forth above, but their versions differ somewhat on the details. On the present record, I am unable to make specific findings as to the nature of the threat or the details of this meeting. It is quite clear, however, that, after the threat and the meeting, Pardue was shaken and became incapacitated by stress and anxiety, for which he required medical attention.

3. Pardue's medical leave

After the meeting with Donley, Pardue called his companion, Dianne Langford,[4] and had her pick him up at work and transport him to a hospital emergency room where he was treated and received a prescription for medication. Langford testified that she called Donley both later in the day on January 26 and on the morning of January 27, and told him about Pardue's medical condition. In the latter call, she told Donley that Pardue had a doctor's note to remain home for 3 days. Donley supported Langford's testimony that she called him the day Pardue left work and went to the emergency room. Indeed, he did not dispute that Pardue, or someone on his behalf, called in to the plant to report his absences on January 27 and 28 (Tr. 250). This is significant because Respondent has a rule, which it would later use in support of its termination of Pardue, that an employee who intends to be absent from work must call in within 2 hours of his starting time. According to the rule, any 2 no call/no shows within a 12-month period are "grounds for termination." (R. Exh. 2.)

It is undisputed that Pardue delivered his doctor's note to Donley, at the plant, on the afternoon of January 28. That note indicated that he should be off work for 3 days. Pardue asked that Donley sign the note and give him a copy. Donley did so. Donley also testified that he gave Pardue a blank copy of a medical leave form, telling Pardue that if his condition were serious he might "need more time." Donley also testified that Pardue did not work on Monday, January 31,but he called in that day to report his absence. Nor did Pardue work on February 1. Although Donley acknowledged in his testimony that Pardue did not work on February 1 he said nothing about Pardue calling in that day; he apparently assumed that the doctor's note delivered on January 28 excused his absence on that day.

Also on January 28, Donley wrote a letter to Pardue and sent it to his address (R. Exh. 4). The letter referred to Pardue's request for timecard reports concerning his still-pending claim to a bonus. Donley included some information on the bonus plan and promised to obtain more timecard information as soon as possible. The letter also referred to their meeting earlier that day and the fact that Pardue had also picked up his check. The letter included, as an enclosure, Respondent's attendance policy, which will be discussed in more detail later in this decision.

On February 1, Donley sent Pardue another letter including the requested timecard information and reminding Pardue that Donley needed to hear from Pardue as to whether he wanted to take extended medical leave. Donley also wrote, contrary to his testimony set forth above that Pardue called in on January 31, that "we have not seen or heard from you since Friday 1/28/00." Donley closed his letter by stating that if he did not hear from Pardue "this week," he would have to consider that Pardue "voluntarily resigned" from Respondent (R. Exh. 5).

Pardue returned to work on Wednesday, February 2. At that time, he submitted a doctor's note, dated the day before, clearing him to return to work, but stating that he "may need occasional brief breaks to relieve anxiety." (GC Exh. 7.) Pardue worked that day, February 2, and the next, February 3. On February 2, Respondent provided pizza to the employees and extended the lunch period by having the employees attend, on company time, a 15-minute speech by Donley announcing and celebrating the Union's withdrawal of the election petition. According to Pardue's uncontradicted testimony on February 3, Pardue again complained to Donley about being mistreated by other employees for his union views.

According to Donley, Pardue or someone on his behalf, called in on the morning of February 4 to say that he would be absent that day (Tr. 256). According to Pardue, he also told Donley that he would return the completed medical leave form next week (Tr. 72).

On the morning of Monday, February 7, according to Donley, Pardue came in to the plant and delivered the completed medical leave form personally to him (Tr. 256). On that form (GC Exh. 8), Pardue's doctor requested leave for Pardue through February 20 for "acute anxiety." Donley testified that he "accepted the document as given" and granted the request (Tr. 256).

Pardue never again reported for work prior to his discharge on February 23. There is a dispute, however, as to whether he called in to report his absences on Monday, February 21 and Wednesday, February 23. Pardue and Langford testified that they called to report his absences, before 8 a.m., on each of those days, as required under Respondent's no call/no show policy. Donley denied that the calls were received. I credit Pardue and Langford rather than Donley on this issue, for reasons set forth later in this decision.

It is undisputed, however, that Respondent did receive, on the afternoon of February 21, by fax, a doctor's notification that Pardue would be off work until February 23 (GC Exh. 9). Donley apparently accepted this notification and relied on it to excuse Pardue for his absence on February 22. It is also undisputed that another fax was received by Respondent on the afternoon of February 23 with a notification from Pardue's doctor that Pardue would not be ready to return to work for an "undetermined" time. The doctor's note is difficult to decipher, but it seems to state that the doctor, the same one whose request that Pardue be off through February 20 was approved by Donley, would determine, after another examination, when Pardue could return to work (GC Exh. 10).

4. Pardue's termination

On February 23, Donley sent a letter to Pardue terminating his employment (GC Exh. 11). The letter stated that Pardue had violated the no call/no show policy by failing either to call within 2 hours of his starting time or to report to work on February 21 and 23. The letter also gave as grounds for the termination Pardue's clocking in 19 minutes late after lunch on February 2 and his failure to clock in after lunch, having previously

[4] Ms. Langford was identified by Pardue as his long-time companion, with whom he lived. Langford testified in this proceeding and identified herself as Mrs. Pardue, his wife.

clocked out for lunch, on February 3. Warnings for those incidents were enclosed in the letter. It is undisputed that Pardue had never before seen those warnings or been told about them. Nor did any supervisor approach him on February 2 or 3 and tell him he had done anything wrong. Indeed, employees are not expected to punch in and out for their 45-minute lunch period.[5]

The warnings were described as first and second warnings for "attendance occurrences." The first said that Pardue "must" return to work "within the break period" or he would be subject to suspension "and up to termination." The second noted Pardue's failure to clock in following lunch and set forth a suspension for this dereliction.[6]

Pursuant to the Respondent's policy (GC Exh. 13), these incidents should not have resulted in discipline, let alone a suspension or discharge, even assuming that they were validly issued, which, as I find, they were not. Respondent's attendance policy states that employees are permitted 12 so-called "attendance occurrences"—which include tardiness, early leave, and absences—within a rolling 12-month period. The policy provides for a progressive disciplinary procedure. After a fourth occurrence a written warning is to be issued; an eighth occurrence results in a suspension; and a twelfth occurrence results in discharge. Each attendance occurrence is required to be documented in writing and contain the employee's and the supervisor's signature.

The termination letter also states that a written warning was drafted after the alleged failure to call in on February 21. The warning, which was enclosed with the letter, was never given or shown to Pardue or discussed with him before the letter was sent. It indicated that this was a second warning and suspension. Additionally, it is unclear if Pardue is being suspended for a total of 2 days, as indicated on his first warning for failing to call in, dated February 21. Or if the suspensions are to be served concurrently, as stated in his second suspension for failing to clock in, dated February 3. What is clear is that the Respondent's progressive discipline policy does not mention, let alone require, written warnings or suspensions for either only 2 attendance occurrences or the first incident of not calling or reporting for work. A fourth document, a termination notice dated February 23, the same date as the letter, and setting forth the alleged February 23 no call/no show, was also enclosed. Donley admitted that before he sent the termination letter he had received the February 23 doctor's notification requesting further time off for Pardue, due to his medical condition (GC Exh. 11 and Tr. 260).

Record evidence of comparable violations of Respondent's no call/no show policy illustrates that the policy was not as strictly enforced against others as it was against Pardue. Employee Jet Reese was simply issued a warning even though he violated the policy on 2 consecutive days in August 2000.[7] Other employees were not immediately terminated as was Pardue, but were terminated only after some time had elapsed between their last day of work and the termination actions. For example, employee Eric White was terminated on April 17, 2000, for failing to report for work or call in since March 8, 2000; Sonya Nellons last worked on August 14, 1998, but she was not terminated until 1 week later; Akieto Twitty last worked on August 21, 1998, and he was terminated on August 26, 1998; Charles Lindamood last worked on March 3, 2000, and was a no call/ no show until March 10, 2000, when he was separated as a voluntary quit; and David Melendez last worked on October 22, 1999, but the separation notice was not issued until November 1, 1999 (Tr. 43–47).

B. Discussion and Analysis

To sustain a discrimination violation, the General Counsel must initially prove that a substantial or motivating factor in the employer's decision was the employee's union or other protected activity. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even absent the union activity. See *Techno Construction Corp.*, 333 NLRB 75 (2001), and cases there cited. As part of meeting his initial burden, the General Counsel may show that the employer's reasons for the challenged personnel decision are false or pretextual. See *National Steel & Shipbuilding Co.*, 324 NLRB 1114, 1119 fn. 11 (1997). Indeed, it has long been recognized that where an employer's stated reasons are false, it can be inferred "that the [real] motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference." *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). See also *Union-Tribune Publishing Co. v. NLRB*, 1 F.3d 486, 491–493 (7th Cir. 1993); and *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000).[8]

The record fairly supports the inference that Respondent discharged Pardue for his union activities. Pardue was the leading union activist among the Respondent's employees. Respondent was clearly opposed to the Union and knew of Pardue's leadership role. Donley teased him for wearing a union message on

[5] It is undisputed that Respondent underpaid Pardue for working on February 2, even after having deducted the time he was allegedly late returning from lunch (Tr. 270 and GC Exh. 17).

[6] Donley testified that the warnings were prepared when he noticed the punch time discrepancies during payroll preparation for the week that included February 2 and 3. According to Donley, that would have been on February 7. Donley also indicated that he did not serve the warnings on Pardue, at that time, because Pardue was on medical leave. I do not believe Donley's testimony on this issue. Pardue personally delivered the completed medical release form to Donley during the morning of February 7. Although the record is silent as to the exact time on February 7 that Donley prepared the warnings, Donley admitted that Pardue came into the plant on February 11 to pick up his paycheck. It is inconceivable to me that, if indeed those warnings were prepared on February 7, they would not have been served on Pardue when he came into the plant on February 7 or, if the warnings were not available on the 7th at the very latest on the 11th, when Pardue arrived to get his check. Moreover, the record shows that Donley sent letters to Pardue on January 28 and February 1 about work-related and indeed attendance matters. Donley offered no believable explanation as to why he did not even attempt to notify Pardue by mail of the warning and the suspension.

[7] On the second day, Reese apparently called in at 8:20 a.m. and reported to work 20 minutes later.

[8] Obviously, if a pretext is shown, the employer has failed to meet its burden of proving that the personnel action would have taken place even without the union activity. See *National Steel*, above.

his hat. According to Pardue, Donley failed adequately to assuage Pardue's concerns that an employee had threatened him over his union activities. This led to Pardue's extended medical leave. He worked only 2 days after the threat and the meeting with Donley over the threat, until his discharge about 4 weeks later. On one of those days, Donley met with employees to celebrate the Union's withdrawal of its election petition and, on the other, Pardue reported to Donley further harassment by fellow employees. The discharge itself came precipitously and without prior warning, on the heels of the union campaign instigated by Pardue. Moreover, despite being well aware of Pardue's continuing medical condition, Respondent discharged him for failing to call in to report absences caused by his medical condition and explained by doctor's notes that had been received by Respondent before the termination. These circumstances tend to support an inference of discrimination.

The inference is strengthened because the reasons offered by Respondent—actually by Donley, who effectuated the discharge and was Respondent's only witness—are pretexts. Donley was not a credible witness, as shown by an analysis of his testimony concerning the warnings to Pardue attached to the termination letter. His testimony concerning the timecard warnings was not credible, as indicated at footnote 6 above. Moreover, those warnings were issued in absentia, so to speak. No one told Pardue he had done anything wrong at the time and employees were not even expected to punch in and out for lunch. The surreptitious way Donley handled these warnings shows that he was looking for a way to be rid of the leading union adherent. Had Donley bothered to investigate the underlying facts, he would have found that the failure to punch in after lunch on February 3 did not mean Pardue overstayed his lunch period, as shown by Pardue's uncontradicted testimony. Had he bothered to investigate the alleged extra 19 minutes for lunch on February 2, Donley would also have learned that that was likewise not a violation that required a warning and a suspension. According to Pardue's uncontradicted testimony, he came back from lunch on time, was told by his supervisor not to punch in but to attend Donley's union-related speech, and he was no more late returning to work than the rest of the employees who attended the speech. Pardue's only "mistake" on these occasions was to punch out for lunch when he was not required to do so. Indeed, Donley's reliance on these incidents not only shows their pretextual nature, but reflects adversely on his credibility, which was also suspect because of his demeanor. I detected in Donley's testimony, particularly in his responses to the General Counsel's questioning of him as an adverse witness early in the trial, a noticeable defensiveness and lack of candor.

The infraction most heavily relied upon by Respondent is Pardue's alleged failure to call in before 8 a.m. on February 21 and 23. That too was a pretext. First of all, Pardue did call in on those occasions, as reflected in the mutually corroborated testimony of Pardue and Langford. I have duly considered that their testimony understandably did not match on all details and they have a close personal relationship. But I find it more significant that they steadfastly insisted that they both talked to Donley on both dates, as required under Respondent's call in rule. Their testimony on this issue survived vigorous cross-examination and they both impressed me, unlike Donley, with their candor. Moreover, it is undisputed—indeed admitted by Donley—that Pardue, or someone on his behalf, called in, appropriately and on time, to report his absences on January 27, 28, 31, and February 4. On other occasions, Pardue took pains to provide Donley with doctor's notes excusing his absences, including on February 21 and 23, the very dates he allegedly failed to call in. Pardue's consistent efforts to adhere to Respondent's rule on these occasions, particularly his previous call ins, makes it likely that he also called in on February 21 and 23, as both he and Langford testified. Thus, I discredit Donley's denial that he received such calls on February 21 and 23.[9]

My finding of pretext is supported by other factors. Donley made no effort to notify Pardue of the warning he issued after Pardue's first alleged no call violation. The statement on the warning that Pardue would be terminated for his next violation is thus meaningless and more than slightly disingenuous. Moreover, Donley knew why Pardue was off work. He accepted the February 21 doctor's note to excuse the February 22 absence and he knew from the note provided on February 23 that Pardue was still ill and under a doctor's care. Despite having received both notes before he mailed his termination letter, Donley went ahead and mailed it. Finally, Pardue was treated differently and more strictly than other no call/no show violators. None was discharged so precipitously after alleged call in violations and under circumstances where the employee was under a doctor's care, as was Pardue. Additionally, save for the termination for the alleged second no call/no show violation, none of the written warnings or suspensions were consistent with the Respondent's written policy and the Respondent has offered no creditable explanation for its actions.

In these circumstances, I have no difficulty in finding that the false reasons Donley gave for Pardue's discharge were an effort to mask the real reason, Pardue's effort to bring a union into the plant. That finding, together with the other surrounding facts that tend to support the inference of discrimination,

[9] In its brief, Respondent attacks the credibility of Pardue and Langford on several grounds, none of which would cause me to reject their testimony in favor of Donley's on this issue. For example, contrary to Respondent, I find it plausible that both Pardue and Langford would both speak on the phone with Donley. Pardue was suffering from acute anxiety, according to his doctor, and after the threat concerning his union activity and his view that Respondent did not do enough to neutralize that threat, he was cautious in his dealings with Respondent. It is understandable that he would want his companion's support. She, after all, had called Donley at least once before on Pardue's behalf, according to Donley's own testimony. Langford impressed me as assertive and very protective of Pardue; it is thus likely that she would have participated in the calls.

I also find without merit the Respondent's contention that Pardue faxed the last two doctor's notes because he feared that if he appeared in person he would have been disciplined. The Respondent's written no call/no show policy does not state that any discipline will be forthcoming after only 1 no call/no show. Thus, at the very least Pardue had no cause to believe that he would be subject to discipline had he personally delivered the February 21 note. Moreover, unlike the absenteeism policy which states that the twelfth occurrence will result in termination, the no call/no show policy merely states that the second incident will be grounds for termination.

lead to the further finding that Respondent's termination of Pardue violated the Act.

CONCLUSION OF LAW

By discharging employee Leslie Pardue, Respondent violated Section 8(a)(3) and (1) of the Act. That violation is an unfair labor practice within the meaning of the Act.

REMEDY

Having found that Respondent engaged in an unfair labor practice, I also find that it must be ordered to cease and desist from its unlawful conduct and to take certain affirmative action designed to effectuate the policies of the Act.

Having unlawfully discharged Leslie Pardue, Respondent must offer him full reinstatement to his former job or, if the job no longer exists, to a substantially equivalent position, without prejudice to his previous rights and privileges. It must also make him whole for any loss of earnings and other benefits he may have suffered because of the discrimination against him, with backpay and interest computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusion of law, and on the entire record, I issue the following recommended[10]

ORDER

The Respondent, Toll Manufacturing Company of Dayton, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining employees because of their union or other concerted protected activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Leslie Pardue full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Leslie Pardue whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Leslie Pardue, including the warnings served on him at the time of his discharge, and, within 3 days thereafter, notify Leslie Pardue in writing that this has been done and that the discharge and the warnings will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region post at its facility in Dayton, Ohio, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy to all current employees and former employees employed by the Respondent at any time since February 23, 2000.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated at Washington, D.C., July 5, 2001

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Teamsters Local Union No. 957, affiliated with the International Brotherhood of Teamsters or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Leslie Pardue full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Leslie Pardue whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Leslie Pardue, and WE WILL, within 3 days thereafter, notify

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

him in writing that this has been done and that the discharge will not be used against him in any way.

TOLL MANUFACTURING COMPANY